IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1315

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72nd STREET CORPORATION,

Petitioners,

vs.

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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(Respondents' appendix annexed)

BRIEF IN OPPOSITION TO CERTIORARI

The petition was filed too late. Jurisdictional basis to entertain it is lacking.

An accurate recital of the prior proceedings brings into proper focus the constant and costly delaying tactics that culminated in this untimely petition. This was an Article 78 proceeding brought under § 7801, *et seq.* of the *New York Civil Practice Law and Rules* (CPLR), for a judgment annulling the unanimous determination of the Board of Standards and Appeals of New York City (Board) on September 14, 1976, granting a zoning *area variance*[1] with respect to a 35 story apartment building to be constructed at East 72nd Street and Third Avenue, two busy streets in Manhattan, 100 feet wide (R 10b).[2]

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[1] The New York Court of Appeals recently noted that "[a]n 'area' variance is one which does not involve a use which is prohibited by the zoning ordinances, while a 'use' variance is one which permits the use of the land which is proscribed (*Matter of Overhill Bldg. Co.* v. *Delany*, 28 NY 2d 449, 453); 3 Anderson, *American Law of Zoning* [2d ed], §§ 18.06-18.07)". The applicant seeking an *area* variance "must satisfy the less demanding standard of showing that strict compliance with the zoning law will cause 'practical difficulties'" whereas "[o]n the other hand, since a prohibited use if permitted will result in the use of the land in a manner inconsistent with the basic character of the zone, a heavier burden is placed on the applicant" (Slip op., p. 5 of New York Court of Appeals, No. 24, Feb. 14, 1978, in *Mtr. of Con Edison Co.* v. *Hoffman, et al., etc.*, 43 NY 2d ——).

The Citizens Union Research Foundation, Inc. of the City of New York (July, 1977) in "An analysis of the decision-making process" of the "Board of Standards and Appeals", by Nancy E. Haycock, notes: *"New York City's zoning law established a pattern for zoning administration across the country. Its standards were incorporated without amendment into the model zoning enabling act prepared by the Department of Commerce. The Board of zoning appeals became a standard feature of zoning administration."* (p. 3)

[2] The pagination of petitioners' Appendix is preceded by the letter A and respondents' by the letter R. All emphasis supplied, unless otherwise noted.

On February 25, 1977, Special Term (Helman, J.) dismissed the proceedings and found it "clear from the record that the Board adhered to its rules scrupulously" and "acted in full compliance with the applicable rules of law and its own rules of procedure" (A 4a, 8a, 9a).

On July 5, 1977, the Appellate Division of the New York Supreme Court (1st Dept.) unanimously affirmed the foregoing judgment of dismissal (*215 East 72nd Street Corp.* v. *Klein, et al.*, 58 AD 2d 751, case No. 11, 396 NYS 2d 22, A 1a-3a). On August 1, 1977, petitioners served notice of appeal to the New York Court of Appeals, specifying that it "is an appeal from *a final order* of the Appellate Division" taken as of right (CPLR §5601(b) subd. 1) claiming "there was directly involved the construction of Article I, Section 6 of the Constitution of the State of New York and Amendment XIV, Section I of the Constitution of the United States." On August 5, 1977 these respondents promptly moved to dismiss the appeal, which motion was granted by the Court of Appeals on September 13, 1977 (R 11b):

> "upon the ground that no substantial constitutional question is directly involved" (*215 East 72nd St. Corp.* v. *Klein*, 42 NY 2d 1012-13, 368 NE 2d 286 [1977])

Petitioners' brief does not annex a copy of that order which recites the foregoing as the basis thereof, but disingenuously states (p. 2) that "the Court of Appeals granted a motion by respondents to dismiss the appeal" and *"rendered no opinion"*.

The dismissal of the appeal by the New York Court of Appeals "for want of a substantial constitutional question is 'tantamount to a dismissal of the constitutional issues on the merits.' *Turco* v. *Monroe County Bar Association*, 554 F.2d 515, 521 (2d Cir.) *cert. denied*, 46 U.S.L.W. 3198 (U.S. Oct. 4, 1977) (No. 76-1816); *McCune* v. *Frank*, 521 F. 2d 1152, 1155 (2d Cir. 1975)" (Slip op. No. 69, p. 14. *Ellentuck* v. *Klein*, —— F. 2d —— [2d Cir.] Jan. 4, 1978.) The order of dismissal of September 13, 1977 was the final determination by the State's highest court on the federal constitutional question presented, and was not subject to further review in the State courts. Petitioners therefore could, and should have filed their petition within 90 days thereafter (28 USCA § 2101(c)). On March 17, 1978 this petition was belatedly filed, 185 days later. No request for an extension of time was made or granted (*cf. Knickerbocker Printing Corp.* v. *U.S.*, 99 L ed 1292; *Goldman, et al.* v. *Fogarty*, 99 L ed 1295).

On October 12, 1977, petitioners made application at the Appellate Division for leave to appeal from its order of affirmance which was denied October 25, 1977 (R 13b). Then followed an application for leave to appeal to the Court of Appeals returnable in that Court on December 12, 1977 and advanced by the clerk thereof to December 5, 1977 which was denied December 19, 1977 (A 10a). The resort to these subsequent applications at the Appellate Division and in the Court of Appeals to bring before the latter court matters, other than or in addition to the constitutional question rejected by the prior order of dismissal, did not extend the time for the filing of this petition (*cf. Cox Broadcasting Corp.* v. *Cohn*, 420 U S 469, 481-5 [1975]).

Statement of the case

The area variance received the overwhelming support of the local Community Planning Board that conducted two well attended public hearings; it also received the support of the Chairman of the City Planning Commission. The Board was unanimous in its determination, after having itself conducted four public hearings (A 5a, 8a). There was a "sun study" filed with the Zoning Board at its request, showing the juxtaposition of the properties on both sides of 72nd Street, a thoroughfare 100 feet wide, and the inconsequential effect that the challenged structure would have on petitioners' property on the longest day of the year.[3]

The Board, in the language of Chief Judge Cardozo (*People ex rel. Fordham Manor Ref. Church* v. *Walsh,* 244 N.Y. 280, 287, 155 NE 575 [1927]) is composed "of men with special qualifications of training and experience." The New York City Charter (§ 661, subd. b) mandated (at that time, 1976) that of the Board's five members, two must be licensed architects with at least fifteen years of experience, one must be a licensed structural engineer with at least fifteen years of experience and one a licensed mechanical engineer with a like term of experience.

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[3] Out of 62 lot owners required by the Board to be given notice, petitioner 215 East 72nd Street Corp. and four of its shareholder tenants were the only ones who brought the proceedings challenging the variance. Although the petition enumerates (pp. 6-7) the area variances sought, such as a "greater ratio of total floor space to the lot area," a variation as to the "set back from the lot line" and as to the number of zoning rooms, also, as to the "mandated number of off-street parking spaces" etc., there is no showing of any damage to the petitioners or any detriment to the community. On the contrary, the proposed structure will enhance the local area.

The meticulous findings of the Board, (its salient and controlling findings are annexed [R 1b-10b *infra*]), described the action taken by the Manhattan Borough Superintendent which preceded the variance application and the proceedings that followed. The Board then noted that at the hearings full opportunity was granted to petitioners, their representatives and witnesses, as well as to "all persons who appeared in opposition" to be heard and to present evidence and arguments in support of their respective positions. While the application was pending "a committee of the Board inspected the subject property and surrounding areas and became fully informed as to the existing conditions." (R 1b).

The record before the Board showed that there were many existing high rise luxury apartments built within the last ten to fifteen years in the neighborhood surrounding this zoning lot. Not only was the proposed structure consistent with the neighborhood zoning pattern, but the variance under attack actually helped preserve an important degree of heterogeneity in the neighborhood (R 9b). Suffice it to say, the carefully considered opinion of Mr. Justice HELMAN at Special Term succinctly and accurately sets forth the conclusions justifiably reached, by the Board and reflected in their findings:

> "The record shows that the unique physical conditions of the zoning lot based on its irregular shape, the occupancy of other buildings on the lot, its location in 4 separate zoning districts, all contributed to the elements of hardship that would result from the denial of a variance. Of the 32,000 square feet involved in the parcel, only 41 percent of the zoning lot, 13,000 square feet, was available for construction. Evidence was offered that if the variance were granted a small return of 4.6 percent

on a net cash investment of over $7 million was realizable, and that if the variance were not granted, a return under the requirements of the existing resolution would be less than 1 percent.

The subject of financial estimates involved in construction was carefully examined by the Board on the basis of testimony on both sides, and in that regard the court must yield to the demonstrated expertise of the Board members. Similarly, in the area of estimated income and the broad subject of tax shelter benefits, the Board acted within its discretion in using its expert judgment as to the customary cash flow analysis, in evaluating a realistic rate of return for Associates (Crossroads Recreation, Inc. v. Broz, 4 N.Y.2d 44).

Much testimony was given also on the general subject as to whether the proposed development would be detrimental to the neighborhood both with regard to room space, light sufficiency, and ample parking space for automobiles. The record demonstrates that the applicant's position in that regard was amply supported by the proof and that no other conforming use was financially feasible (Matter of Envoy Towers Co. v. Klein, 51 A.D. 2d 925).

Little need be said concerning the objection of the opponents of a variance, that the hardship was self-created since that subject was thoroughly examined by the Board. The record contains ample evidence that Associates had sought over a 4 year period to take reasonable measures to conform to the existing resolution, but had run into unforeseeable problems and difficulties." (A 6a-7a)

The Court concluded that:

> "On the record, therefore, it is clear not only that the Zoning Board had the authority to grant this area variance, but that the same was 'minimal' as required by statute, was supported by substantial proof, and was in no respect arbitrary and capricious (Matter of Craig v. Zoning Board of Appeals, 50 App. Div. 887." (A 7a)

On the procedural aspects, the Court found that:

> "It appears from this record that the opponents of this variance were heard at length, and presented extensive materials to the Board in the course of several hearings from June 22 to Aug. 20, 1976. No charge is made here that the Board was in any way biased, or that it failed in its responsibility to expressly provide for notice to all interested parties with an opportunity to speak, be represented by counsel, and to submit oral or written evidence in opposition to the variance. Nor was the failure to conduct lengthy examinations a denial of their rights. A cross-examination at this type of hearing is frequently disruptive, and is uncommon at Board hearings (2 Anderson, N. Y. Zoning Law and Practice 20.16).
>
> In all, the Board's rules provide adequate protection for all interests affected by the issuance of zoning variances, and in this case it is clear from the record that the Board adhered to its rules scrupulously. The court finds on the entire record that the Board acted in full compliance with applicable rules of law and its own Rules of Procedures. Its determination will in all respects be affirmed." (A 8a-9a)

The Appellate Division unanimously held "we affirm for the reasons stated at Special Term" (*215 East 72nd St. Corp.* v. *Klein, et al., supra* p. 2; A 1a-3a).

The constitutional challenge properly rejected in the State courts is not worthy of review here.

The Appellate Division, although unanimously affirming "for the reasons stated at Special Term", was seemingly "perturbed" because the Board "merely noted that required findings *had been made*" and "[i]t was not until the answer and the return in this Article 78 proceeding that the facts found, which led to its conclusions were disclosed." (A 3a). The Appellate Division itself recognized that "the practice condoned, if not upheld, by the Court of Appeals has been to allow reliance on findings contained in the return to the petition. (*Matter of N.Y. City Housing & Development Bd.* v. *Foley,* 23 A.D. 2d 84, *aff'd without op.,* 16 N.Y. 2d 1071; see *Matter of Elliott* v. *Galvin,* 33 N.Y. 2d 594, 596.)" (A 3a)

In moving to dismiss the appeal taken to the New York Court of Appeals as of right upon constitutional grounds (p. 2, *supra*) respondents successfully contended:

> "Here there was no denial of due process because the detailed findings were set forth in the answer to this proceeding rather than in the formal decision that was rendered on the basis of a record which has been judicially recognized below as amply clear and convincingly supporting the findings. The alleged defect, if any, could be readily remedied by the simple mechanic of directing a remand to the Board to incorporate the factual detailed findings as part of the formal decision that was rendered. That, as it has been judicially recognized, would be an exercise in futility. *Nor would there be the slightest reason to suppose in view of the protracted, extended and careful consideration given*

> *to the matter by the Board, as this record reflects, that there would be any change in substance in the findings of fact that were so carefully delineated.*"[4]

The Court of Appeals evidently did not regard the narrow issue which "perturbed" the Appellate Division of sufficient constitutional dimension to merit consideration. Nor did the State courts find that petitioners on the subsequent applications for leave to appeal at the Appellate Division and in the Court of Appeals, presented any issue, constitutional or otherwise, that merited further review.

Petitioners (p. 12) lament that "[t]he 'due process explosion' has not yet reached zoning or related land use proceedings", pointing out that "[b]eginning with *Village of Euclid* v. *Ambler Realty Co.,* 272 US 365 (1926), this Court has decided 13 zoning cases, all of which have involved *substantive* rights" (emphasis in original). This case calls for no expansion, as petitioners' brief contends, (p. 11) of the "due process explosion" to nuclear proportions, by adding challenged area variances to the "considerable progeny" stated to be spawned by *Goldberg* v. *Kelly,* 397 US 254 [1970]. Nor does the parade of authorities relied on in the petition (footnotes 8-10; pp. 11-13) justify any such intolerable increase in this Court's heavy caseload. (*cf. Vermont Yankee Nuclear Corp.* v. *NRDA,* 46 U.S.L.W. 4301, Apr. 3, 1978 Nos. 76-419 and 76-528).

Although "in the case of an area variance, a significant factor is the magnitude of the variance sought, since the

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[4] In *Mtr. N.Y.C. Housing Bd.* v. *Foley, supra,* the same court earlier held that "a remand for the sole purpose of transposing the material in the return to a new formal decision would serve no useful purpose." (p. 87 [1965]). A like conclusion was reached by the Court of Appeals in *Ellentuck* v. *Klein,* 39 NY 2d 743 [1976] dismissing an appeal presenting a like constitutional challenge.

greater the deviation the more likely it is that the impact on the community will be severe" (*Mtr. of Con Edison Co.* v. *Hoffman, et al., etc., supra*), no such compelling situation is here present. More important, it is not shown that controlling evidence to that effect was introduced and disregarded or controlling proof was offered and rejected, resulting in the denial of an adequate hearing, or in what respect the detailed, specific and impressive findings of the Board were or are demonstrably erroneous.

The New York Zoning resolution expressly provides (72-21) that "[w]here it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this resolution" (A 4). The legislature has thus delegated to the Board, an expert body, the authority and power to grant variances under appropriate circumstances. The Court of Appeals in *Matter of Lemir Realty Corp.* v. *Larkin,* 11 NY 2d 20, 181 NE 2d 407 [1962] emphasizes that it is:

> "the settled rule that in reviewing board actions as to variances • • • the courts do not make new or substitute judgments but restrict themselves to ascertaining whether there has been illegality, arbitrariness or abuse of discretion." (p. 24)

Mr. Justice Helman, whose decision here was sustained in the appellate courts, noted:

> "No charge is made here that the Board was in any way biased, or that it failed in its responsibility to expressly provide for notice to all interested parties with an opportunity to speak, be represented by counsel, and to submit oral or written evidence in opposition to the variance." (A 8a)

Since an area variance does not alter the basic character and nature of the community as does a use variance, there necessarily exists greater flexibility in the granting of such variances. An area variance merely releases a land owner from complying with the strict letter of a zoning ordinance so that his land may be put to a permitted use. The Board necessarily is vested with broad discretion as to the nature and scope of the hearing. The conventions of a formal trial and the presentation, examination and cross-examination of witnesses and rules as to hearsay evidence in the very nature of things cannot be rigidly required or made mandatory (*People ex rel Fordham Manor Reformed Church* v. *Walsh, supra; Matter of Von Kohorn* v. *Morrell,* 9 NY 2d 27, 32, 172 NE 2d 287 [1961].)

In *Morrissey* v. *Brewer,* 408 US 471 [1972], Chief Justice Burger stressed the need for flexibility that necessarily must be attuned to the particular circumstances:

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function as well as of the private interest that has been affected by a governmental action.' • • • To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations

calling for procedural safeguards call for the same kind of procedure." (p. 481)

This Court later in *Matthews* v. *Eldridge*, 424 US 319 [1976], reaffirming *Morrissey* treated with the variables which determine "what process is due":

> "'"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' • • • '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' • • • Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. • • • *More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.*" (pp. 334-5)

It was on the basis of the earlier decision of this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 [1970] that the Appellate Division was "perturbed" as to whether the Board's determination that the "required findings *had been made*" but, which were not disclosed "until the answer and return in this Article 78 proceeding" were filed, "accords with procedural due process". Although the Appellate Division, as already noted considered that "a question properly raised" (A 3a), the Court of Appeals rejected it as an unsubstantial constitutional challenge and dismissed the appeal (p. 2 *supra*). Thereafter, both the Appellate Division and Court of Appeals denied petitioners' application for leave to have this case reviewed by the Court of Appeals (p. 3 *supra*). Hence no question of constitutional magnitude survived worthy of review here.

It is unnecessary to engage in an esoteric dissertation as to whether the Board's determination is adjudicative or legislative, since procedural due process in full measure was accorded to all concerned, even to those who manifested an interest but who could not materially be detrimentally affected or legally damaged (R 9b). Variances, as petitioners' brief recognizes (p. 16) "are a necessary flexibility device". Admittedly, as the petition acknowledges (p. 16), there are "tens of thousands of variance applications each year" occasioned by innumerable and varying factors whose impact may not be readily estimated or measured, much less straightjacketed in a uniform definition or a rigid regulation. Flexibility in that fluid situation, indeed informality to a considerable degree is reasonably necessary and serves to enhance expeditious disposition that might otherwise prove harmful and costly, perforce of inordinate delay. Judge FRIENDLY's article (*Some Kind of Hearing*, 123 U.Pa. L. Rev. 1267 [1975]), so greatly stressed in the petition (pp. 7, 11, 20, 22) sagely comments:

> "• • • with the vast increase in the number and types of hearings required in all areas in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues." (p. 1268)

This record presents no need for the "over-judicialization of administrative procedures", nor to broaden the scope of judicial review. An administrative agency such as the Board "must be entitled reasonably to limit their number [of witnesses] and the scope of examination" (FRIENDLY *supra* p. 1282).

It cannot be denied that unsworn statements, either oral or in writing, or those that may fall in the category of hearsay may be informative and indeed essential to the consideration and determination of an administrative agency whose functions would be impaired, if not rendered ineffective, if it were compelled to resort to the formalities of a conventional trial and be bound by rigid rules of evidence. In any event, this record does not call upon this Court to evaluate, much less set up formal stringent rules of procedural due process with respect to zoning area variances.

Petitioners' basically contend (p. 15) that "it is almost universally required that a zoning board of appeals make specific findings and base its decisions on such findings." It cannot be denied that that is precisely what was done here. The Petition designedly omits from its appendix and completely ignores the meticulous and comprehensive findings upon which the Board's determination rested (R. 1b-10b).

Petitioners' structure, diagonally across the street, was built in 1928. The Board's findings established that this plot was assembled in 1969 at a cost of $3¼ million exclusive of huge operating cash losses. It was irregular in area upon which seven outmoded buildings and stores were situated. Inherently, the proposed structure on the assembled irregular lot necessitated zoning variances that could not and did not detrimentally affect the locale and adjacent structures or the community residents in the

vicinity (R 9b). The practical difficulties and inordinate delay entailed thereby are graphically shown in the Board's detailed findings (R 1b-9b). A cursory glance at the findings that treat with the mere relocation of the tenants in rent controlled apartments evince the obstacles encountered and the inordinate time and burdensome fashion in which they were compelled to be ultimately resolved and at a huge cost (R 6b-9b).

This Certiorari proceeding was brought by petitioners *six weeks after* the proposed project was commenced on February 1, 1978 by the demolition of two of the existing buildings. Excavation, underpinning and foundation work have progressed very substantially. Millions of dollars have already been invested. And as the Board noted in its findings:

> "Due to its having been largely cleared and vacated, the subject property is producing very little income, and, yet, due to its value, condition and location, it *has engendered staggering operating losses.*" (R 6b).

As Mr. Justice Helman at Special Term noted, "[n]o charge is made here that the Board was in any way biased" (A 8a). More important, the petition does not undertake to demonstrate in what respect, if any, the meticulous findings made by the Board can be shown to be unwarranted by the record, or in what respect, if any, petitioners were denied full opportunity to establish that. Special Term pointed out there was adequate "notice to all interested parties, with an opportunity to speak, be represented by counsel and to submit oral and written evidence in opposition to the variance" (A 8a). As already indicated, the unanimous Appellate Division expressly affirmed "for the reasons stated at Special Term" (A 2a).

After the New York Court of Appeals dismissed petitioners' appeal taken as of right upon the asserted constitutional ground (p. 2, *supra*), both the Appellate Division and the Court of Appeals thereafter decided that the record here presents no question, constitutional or otherwise, that merited further review by the State's highest court (p. 3, *supra*).

With the situation in the foregoing unassailable posture, petitioners' brief with ill grace and with the same lack of candor already noted (p. 2, *supra*), endeavors to give an unfavorable, if not sinister cast, derogatory of respondent Lindenbaum's experience and expertise in this field. Petitioners' brief (p. 19) quotes the Citizens Union study, to the effect that respondent Lindenbaum, the applicant here, "was involved only in Manhattan cases 89% of the time as a representative of a professional developer" and "the attorney in 76% of the cases involving more than 16 stories", and that it "is worth noting" he seldom did "lose a case". Petitioners' brief omits the reference by the Citizens Union tract that "this can partially be explained" because of the "effective presentations" made by counsel who was "well prepared with persuasive legal, policy and planning arguments" and that the attorneys in this field "can be very selective in their choice of clients"; also it may be added, in their choice of cases.[5]

It is significant that not a single court decision is cited, which reflects adversely upon the professional expertise of counsel, or the professional services he rendered and the results achieved. And it must be assumed, as indeed was the case here, since the Court at Special Term, the Appellate Division and the Court of Appeals without dissent sustained the result that his expertise produced, petitioners

[5] Citizens Union Analysis, *supra* at pp. 12-13.

can have no just quarrel except with themselves and their counsel for the outcome. It is disquieting to find resort to such dubious strategy which has no proper place in the petition.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

• • •

24. The application was afforded a public hearing by the Board on June 22, 1976, after due notice by publication in the bulletin of the Board and notice by mail to all persons entitled to such notice in accordance with the Board's Rules of Procedure. The hearing was continued on July 13, 1976, July 27, 1976, and September 14, 1976.

25. At the hearings, the board afforded the applicants' representatives and witnesses and all persons who appeared in opposition to the application and their representatives a full opportunity to be heard, to present evidence and to make argument in support of their respective positions.

26. While the application was pending before the Board, a committee of the Board inspected the subject property and the surrounding area and became fully informed as to existing conditions.

27. On September 14, 1976, after giving due consideration to all matters connected with the application before it, the Board, by resolution adopted that day by a unanimous vote of its members, a copy of which is contained on page one of the Transcript of Record attached hereto, determined that the application before it was an appropriate case under Section 72-21 of the Zoning Resolution "to permit in a R8, R10, C1-5 and C1-9 district on a plot with two existing structures, the erection of a 35-story mixed building that exceeds the adjusted floor area ratio,

height of the front wall and lot area per room, encroaches on the required distance between buildings and with less than the required accessory parking, ON CONDITION that all work shall substantially conform to drawings filed with this application, marked "Received March 23, 1976," 1 sheet; "May 25, 1976," 6 sheets RBQ Deputy Director, and "August 20, 1976," 1 sheet; and that all laws, rules and regulations applicable be complied with, and that substantial construction be completed within one year from the date of this resolution."

28. In granting the application for the variance pursuant to Section 72-21 of the Zoning Resolution, subject to the conditions set forth in its resolution, the Board, on the basis of evidence in the record, and inspection of the subject property by a committee of the Board, and by reason of the expert knowledge of the Board, made the following findings:

A. The subject property is identified as 201-209 East 71st Street, 200-206 East 72nd Street, 1231-1247 Third Avenue, Manhattan, New York, Block 1426, Lots 1, 5 and 44.

B. The subject property consists of an "L" shaped parcel occupying the entire 204′4″ blockfront on the east side of Third Avenue between East 71st Street and East 72nd Street and has frontage of 127′11″ on the south side of East 72nd Street and 185′0″ on the north side of East 71st Street. From its north eastern extremity the subject property extends to a depth of 102′2″ south of East 72nd Street (to the center line of the block), thence easterly 57′1″ along th center line to a point 185′0″ east of Third Avenue thence southerly 102′2″ to East 71st Street.

C. According to the zoning maps which accompany and are a part of the Zoning Resolution (see Zoning Map 8c), that portion of the subject property which lies north of the center line of the block (the "northerly portion") and within 100′0″ of Third Avenue is zoned C1-5 within an R10 district, and the balance of said northerly portion is zoned R10. The portion which lies to the south of the center line (the "southerly portion") and within 125′0″ of Third Avenue is zoned C1-9, the balance of said southerly portion being zoned R8. The subject property is located within Manhattan Community Planning Board No. 8.

D. The subject property contains a total lot area of approximately 31,971.03 square feet, of which 25,840.83 square feet (or 80.83%) are located in R10 or R10 equivalent districts (C1-5 and C1-9) and 6,130.2 square feet (or 19.17%) are located within an R8 district.

E. The subject property is presently improved, in part, with a partially occupied four-story mixed-use building, known as 201 East 71st Street, built in 1870 and remodelled in 1935, which contains some 33 apartments and some six vacant stores having frontage along Third Avenue. Said building is located on the southerly portion of the subject property, and has frontage of 102′2″ on Third Avenue and frontage of 90′ on East 71st Street. Also having frontage on East 71st Street (approx. 75′) is the building known as 207 (or 207-209) East 71st and occupied by the Dominican Congregation as a residence for women. The fee title to this portion of the subject property (the "Air Rights Portion"), including the yard behind it, is vested in said Dominican Congregation, who have leased it to the applicant for a term of almost 99

years, taking back a sub-lease thereto except for the unused excess floor area attributable to it. There are also two small, vacant, four-story buidings which are located on the notherly portion of the subject property (206 East 72nd Street and 1243 Third Avenue), both of which the applicant plans to demolish in order to clear a site for the proposed new building. The balance of the subject property is open, vacant and fenced, the structures previously located thereon having been demolished by applicant in preparation for its planned redevelopment of the subject property.

F. With this application the applicant seeks a variance pursuant to Section 72-21 of the Zoning Resolution, to permit the erection, on the northerly portion of the subject property, of a new 35-story mixed-use building which exceeds the permitted floor area ratio, height of front wall and lot area per room limits, encroaches on the required distance between buildings on the same zoning lot and contains less than the required accessory parking.

G. The principal part of the subject property (a parcel occupying the entire 204 foot block-front on Third Avenue and extending to a depth of 110 feet on both 72nd and 71st Streets) was assembled by the applicant by December, 1969, at a total cost, exclusive of operating cash losses of almost three and a quarter million dollars. In March 1970 applicant filed plans for a hi-rise apartment house with stores to occupy said site and the plans were approved in late 1971. In early 1972 the applicant commenced proceedings in the Office of Rent Control of the City of New York to obtain Certificates of Eviction permitting vacation and demolition of all buildings. During the pendency of these proceedings, the applicant obtained

by lease, in May 1972, the "air rights" to the adjoining property owned by the Dominican Congregation, 207-209 East 71st Street. In December of 1972, the applicant also acquired (at a cost of $175,000) and added to the subject property a contiguous lot having 17.11 feet frontage at 206 East 72nd Street thereby bringing the subject property to its present dimensions.

H. During 1972 applicant terminated the leases for the stores along Third Avenue and demolished four of the buildings on the subject property, leaving 1243 Third Avenue and 201 East 71st Street standing. In May of 1972, applicant filed an application (Cal. No. BZ-365-72) with this Board for a variance which would allow the construction on the subject property (which then did not include the later-added small parcel known as 206 East 72nd Street) of a 38-story mixed use building exceeding in that portion of the property located in an R10 district the maximum adjusted floor area ratio permitted therein and encroaching on the minimum distance required between buildings. The proposed 38-story building and its adjoining plazas would have occupied substantially all of the subject property except the Air Rights Portion, (see Transcript of Record, pp. 211-L, -M, -N, and -O). On December 12, 1972, this Board duly granted said application for a variance by unanimous resolution. Said variance allowed, in effect, the transfer of most of the 53,979 sq. feet of unused floor area attributable to the Air Rights Portion of the subject property to be transferred to the proposed building, which would have a total of some 311,577.65 sq. ft. of floor area. Said variance also allowed the proposed building to abut in part the existing building on the Air Rights Portion. Otherwise, the proposed building complied with applicable bulk regulations.

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

I. Despite diligent continuous efforts to do so, and despite its readiness to proceed in all other respects, the applicant was unable, as of Summer 1975, to vacate (for purposes of their demolition) two buildings on the subject property. This was due in part to vigorous resistance to relocation by the tenants of three rent-controlled apartments at 1239-43 Third Avenue and 15 such apartments at 201 East 71st Street, and in part to delays occurring in the eviction process which were not caused by neglect or fault on the part of applicant. In March 1975, counsel for the applicant was approached by the Chairman of the Zoning Committee of Community Planning Board No. 8, on behalf of the tenants, with a proposal to resolve the matter by relocating the three tenants remaining at 1243 Third Avenue to 201 East 71st Street, so that applicant would be free to clear and build on the northerly portion of the subject property. Finally on October 31, 1975, after extensive negotiations, the applicant made an agreement with the tenants which provided, inter alia, for the said relocation of the three tenants remaining at 1243 Third Avenue to 201 East 71st Street, surrender by applicant of the Certificates of Eviction which it had obtained, discontinuance with prejudice of all proceedings in Court and before the Office of Rent Control to vacate the premises, preservation of the statutory rents for three years and continuation of the tenancies under Rent Stabilization, and eventual remodelling of 201 East 71st Street at a cost of $250,000. These terms were agreed to in good faith by the applicant to avoid further costly delay of its redevelopment plans for the subject property. Due to its having been largely cleared and vacated, the subject property is producing very little income, and, yet, due to its value, condition and location, it has engendered staggering operating losses.

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

J. The period between March 1975 and the filing of this application was spent in good faith efforts by applicant to obtain a special permit from the City Planning Commission to allow it to build a mixed building with sufficient floor area to afford the applicant a reasonable return on its investment. This effort was ultimately unsuccessful, thereby precipitating the instant application to this Board for a variance based practical difficulties and unnecessary hardship.

K. There are unique physical conditions peculiar to and inherent in the zoning lot comprising the subject property. As a result of these unique physical conditions, practical difficulties and unnecessary hardship arise in complying strictly with the bulk provisions of the Zoning Resolution, and such practical difficulties and unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood and district in which the subject property is located.

L. The subject property is physically unique in that a major portion (9,180 sq. ft.) of it is improved with a four-story mixed use building which, despite diligent, good faith efforts extending over several years, applicant cannot vacate except at the cost of further, very costly and unpredictable delay. Since another 9,690 sq. feet is included within the Air Rights Portion and its adjoining alley, only some 13,101 sq. ft. is physically available, as a practical matter, for new construction, despite the overall lot area of 31,971 sq. ft. Applicant's difficulties are illustrated by the fact that a building *complying* in all respects with applicable bulk regulations (except for the required distance between it and 201 E. 71st Street) would have to be 62 stories (or 558′) tall (as compared with

a 55′ depth and an 81′ width) in order to provide comparable floor area to the proposed structure. (T.R. 211-H, -I). The cost of building such a structure would be prohibitive in comparison with the income which it would produce.

M. Because of the physical conditions there is no reasonable possibility that the development of the subject property in strict compliance with the applicable bulk provisions of the Zoning Resolution will yield a reasonable return, and, therefore, the grant of variance is necessary to enable applicant to realize a reasonable return from the subject property.

N. The cost of acquiring the land and leasehold comprising the subject property is over $3,400,000. The operating expenses incurred by applicant in maintaining part or all of the subject property from 1969 through 1975 (taxes, interest, fuel, utilities, labor, maintenance, etc.) totalled almost three million dollars as compared with only about one-half million in income during that period. Projected operated expenses through 1976 continue at the same rate, while the annual income from the subject property has diminished to about $25,000, due to its having been extensively cleared and vacated in preparation for the proposed redevelopment. Thus the total actual and projected land cost through construction and completion of the proposed new building of $6,650,000 is realistic and probable.

O. Applicant proposes to build on the northerly portion of the subject property a thirty-five story, mixed-use building having floor area of 357,775 sq. ft. and containing 433 apartments and 8,190 sq. ft. of store space at ground level with 2,800 sq. ft. of commercial space below

the stores, plus 40 garage spaces in the cellar. The estimated construction costs of $36.00 per square foot cited by applicant (T.R. 61), as well as the other related project costs, totalling $24,720,700, are reasonable and credible for the proposed development at the location of the subject property. Since applicant anticipates an FHA mortgage of $17,636,300, its net cash equity investment in the completed project would be $7,084,400. The probable net income from the project less than total operating and maintenance expenses, taxes and mortgage amortization and interest would leave applicant with a net cash flow of $322,500, or a return of 4.6% per annum on its investment of $7,084,000. The proposed project would thus afford applicant no more than a reasonable return.

P. The variance granted herewith will not alter the essential character of the neighborhood or district in which the subject property is located, nor will it impair the appropriate use and development of adjacent property and it will not be detrimental to the public welfare. The proposed building is typical of recent development in the upper East Side of Manhattan, especially in the neighborhood of the subject property. Indeed, within the four hundred feet notification area alone there are a 35-story building, a 34-story building, two 27-story buildings, and three 20-story buildings. The neighborhood in which the subject property is located contains many high-rise residential buildings, and is a growing, desirable area where the demand for quality housing is ever-increasing. The density of the proposed building, especially in view of the continued existence of 201 E. 71st Street (the four-story mixed use building on the southerly portion) and 207 E. 71st Street (the Dominican Congregation Resi-

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

dence) will not cause an unreasonable burden to the existing facilities and resources of the district. Although the overall floor area ratio of the proposed development on the subject property will be 12.7, the residential floor area ratio of the development will be less than 12 and, if the building at 201 East 71st Street was demolished, the overall floor area ratio of the entire proposed development on the subject property would be less than 12. The widths of Third Avenue and East 72nd Street (both of which are exceptionally wide thoroughfares) mitigate the effects of the lack of initial setback and the required Tower setback. The provision of only 40 parking spaces will not adversely affect the neighborhood since commercial parking facilities are available in the area to an extent adequate to absorb such additional burden as the proposed building might create.

Q. The practical difficulties and unnecessary hardship have not been created by the owner or its predecessors in title. They are inherent in the land and result from the applicablity of the provisions of the Zoning Resolution to this Zoning lot.

R. Within the intent and purpose of the Zoning Resolution, the variance granted is the minimum variance necessary to afford relief.

Order of the Court of Appeals Granting Respondents' Motion to Dismiss Petitioners' Appeal to the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of September A. D. 1977.

Present,

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

Mo. No. 826

In the Matter of

215 EAST 72ND STREET CORPORATION, &ors.,

Appellants,

vs.

JOSEPH B. KLEIN, as Chairman, &ors., as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, *et al.*,

Respondents.

A motion having heretofore been made herein upon the part of the respondents Samuel Lindenbaum, 72nd Street Associates and David Berg (1) to dismiss the appeal

Order of the Court of Appeals Granting Respondents' Motion to Dismiss Petitioners' Appeal to the Court of Appeals

taken as of right by the appellants in the above cause to this Court or to provide a calendar preference for argument of the appeal, and (2) to *sua sponte* deny leave to appeal to the Court of Appeals &c., papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion to dismiss the appeal taken as of right be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for a preference be and the same hereby is dismissed as academic; and it is

ORDERED, that the said motion for *sua sponte* denial of leave to appeal &c. be and the same hereby is denied.

JOSEPH W. BELLACOSA
Clerk of the Court

Order of the Appellate Division Denying Petitioners' Motion For Leave to Appeal to the Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 25, 1977

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Theodore R. Kupferman,
Herbert B. Evans,
Louis J. Capozzoli, Justices.

In the Matter of the Application of

215 EAST 72nd STREET CORPORATION, JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA MCLANAHAN and ELIZABETH B. PARKINSON,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

—against—

JOSEPH B. KLIEN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents-Respondents.

M-3491

Order of the Appellate Division Denying Petitioners' Motion For Leave to Appeal to the Court of Appeals

The above-named petitioners-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered on July 5, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of David Sive in support of said motion and the affidavit of David Berg and the statement of Leonard Olarsch in opposition thereto, and after hearing Mr. David Sive for the motion and Messrs. David Berg and Leonard Olarsch opposed,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk